

# State of Colorado



Bill Owens  
Governor

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Board Chair

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State Personnel Board  
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## AGENDA PUBLIC BOARD MEETING January 17, 2006

A public meeting of the State Personnel Board will be held on Tuesday, January 17, 2006, at the Colorado Department of Human Services, Colorado Mental Health Institute at Pueblo, 1600 West 24<sup>th</sup> Street, Conference Room A, Pueblo, Colorado 81003. The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by January 12, 2006.

### I. REQUESTS FOR RESIDENCY WAIVERS

A. January 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

### II. PENDING MATTERS

There are no pending matters before the Board this month.

### III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. Perry Venard v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2000B114.

In this disciplinary termination, substantial evidence supported the appointing authority's termination decision. At hearing, Complainant, a correctional support supervisor, was unsuccessful in persuading the ALJ that the incident reports he filed were not intentionally false. In affirming Respondent's action, the ALJ found that filing accurate incident reports is extremely important for the safety and security of a DOC facility, and along with telling the truth, is the obligation of all staff members.

On December 4, 2000, the Initial Decision of the Administrative Law Judge was issued. Complainant filed his first appeal of the Initial Decision on January 2, 2001. On September 18, 2001, "while noting that the issues which are in dispute are supported by the Initial Decision and a full and complete transcript is not necessary in an administrative

proceeding, the Board voted to adopt the findings of fact and conclusions of law of the Administrative Law Judge in the Initial Decision of the Administrative Law Judge."

On October 30, 2001, Complainant appealed the Board Order to the Court of Appeals. On May 8, 2003, the Court of Appeals issued its Order Vacated and Case Remanded with Directions. Subsequently, the Order of the State Personnel Board on Remand was issued on August 22, 2003, as follows: "[p]ursuant to the direction of the Colorado Court of Appeals, the Board reconsidered Complainant's motion for a new hearing or remand and the taking of supplemental testimony, originally filed on February 28, 2001, and also reconsidered Complainant's motion to supplement the record, originally filed on April 18, 2001. The Board voted to deny both motions made by Complainant. In a separate vote, at that same Board meeting, the Board voted to affirm and to ratify the Order of the State Personnel Board dated September 25, 2001, adopting the findings of fact and conclusions of law of the Administrative Law Judge in the Initial Decision of the Administrative Law Judge.

Complainant filed another Notice of Appeal with the Court of Appeals on September 15, 2003. In an unpublished decision announced November 10, 2004, the Court of Appeals again issued its Orders Vacated and Case Remanded with Directions, which ordered the Board to remand the case to the ALJ for a hearing to take testimony. On March 17, 2005, a second Order of the State Personnel Board on Remand was issued, stating: "IT IS HEREBY ORDERED that this matter is remanded for the purpose of taking testimony that could not be transcribed as set forth in the Court of Appeals' decision, including the testimony of the warden and two additional witnesses."

The additional testimony was taken by the ALJ on August 17, 2005. On September 1, 2005, Complainant filed Complainant's Notice of Continued Appeal and Further Designation of Record. On November 28, 2005, Complainant filed Complainant's Opening Brief; on December 15, 2005, Respondent filed Respondent's Answer Brief.

#### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING**

A. Emmanuel Toks Adeniran v. Department of Revenue, Colorado Lottery, State Personnel Board case number 2005G039.

Complainant, a certified Administrative Assistant I for the Department of Revenue, Colorado Lottery, filed a petition for hearing on November 2, 2005, arguing that he was wrongfully denied relief in a Step II grievance decision. Complainant contends that the final grievance decision was arbitrary and capricious because he was denied a "promised pay increase by a certain time in lieu of a job offer from another agency."

Respondent argues that Complainant failed to meet his burden of showing that valid issues exist that merit a full hearing because Respondent followed Administrative Procedures and Complainant's arguments that issues of fairness should win over arguments of rule and procedure and that a counteroffer was made or enforceable must fail.

On December 21, 2005, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

B. Pamela Cress v. Department of Human Services, State Personnel Board case number 2005S012.

On February 16, 2005, Complainant filed her petition seeking a discretionary evidentiary hearing in connection with her non-selection for the position of Accounting Technician II by the Department of Human Services (DHS). Complainant alleges that she was not selected due to retaliation on the part of DHS for her appeal of her termination (State Personnel Board case number 2005B011), and on the basis of a policy against hiring previously terminated state employees, which does not follow various Director's Procedures. As relief, Complainant requests that, "Cress' appeal of her unsuccessful application be considered in the due process allowed by the State Personnel Board."

Respondent responded to the appeal with a motion to dismiss, arguing that Complainant has not opposed any practice made discriminatory under the statute and thus there is no legal basis for a claim of retaliation. In its information sheet, Respondent further argues that Director's Procedure P-4-15(A)4 (now Director's Procedure 4-21) allows removal of an applicant from all employment lists for violation of a state regulation that may affect the ability to perform the job and a person who has been terminated for disciplinary reasons has necessarily been in violation of Board Rule R-6-9 (now Board Rule 6-12B).

On January 4, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

C. Michael M. Kiley v. Department of Health Care Policy and Financing, State Personnel Board case number 2005S007.

Complainant filed a petition for hearing seeking a discretionary evidentiary hearing to review his non-selection for the position of Clinic Coordinator General Professional IV by the Department of Health Care Policy and Financing. Complainant alleges that Respondent has engaged in age and gender-based discrimination in this matter. As relief, Complainant requests that the Board set aside the action to make system changes to prevent a future recurrence and bar the agency from a repeat recruitment.

Respondent filed no Information Sheet; therefore, the Preliminary Recommendation is based solely on the information provided by Complainant pursuant to Rule 8-49(A), 4CCR 801.

On January 5, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

**V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR**

A. Paul Baca v. Department of Corrections, Fremont Correctional Facility, State Personnel Board case number 2004B152 (December 15, 2005).

Complainant, a correctional officer, appealed his termination, alleging that it was arbitrary and that Respondent discriminated against him based on his race and sexual orientation and seeking reinstatement, back pay, benefits, and transfer to a different facility. After hearing, the ALJ found that Complainant committed the acts for which he was terminated, including sexually harassing a female employee who was under his direct chain of command and violating several provisions of the agency's Code of Conduct. In addition, the ALJ concluded that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances; thus, the decision to terminate was not arbitrary, capricious or contrary to rule or law and the discipline imposed was within the range of reasonable alternatives. Finally, affirming Respondent's action, the ALJ found that Complainant failed to establish

any circumstances that gave rise to an inference of unlawful discrimination based on either his race or his sexual orientation.

- B. Patricia Jones v. Department of Corrections, State Personnel Board case number 2003B165 (December 15, 2005).

Complainant, a budget analyst, appealed the abolishment of her position by Respondent, requesting reinstatement, back pay, an award of attorney fees and costs, and sanctions against her appointing authority. After hearing, the ALJ determined that Respondent's action was arbitrary, capricious, or contrary to rule or law because there was no lack of funds necessitating the abolishment of Complainant's position; therefore, the layoff was contrary to state law and Board Rule R-7-7. The ALJ also found that Respondent's violation of its own layoff directives was arbitrary and capricious, but that Respondent did not violate the Employee Protection (Whistleblower) Act in abolishing Complainant's position. In addition, the ALJ concluded that Respondent retaliated against Complainant for appealing her layoff, consistent with the agency's policy as enunciated in an August 15, 2003 memorandum, including transferring her to a clerical job and eliminating a budget analyst position from her reach. As a result, the ALJ ordered that Complainant is reinstated to the budget analyst position she occupied at Headquarters in Colorado Springs, retroactive to July 1, 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this action; Respondent is to refrain from any further retaliation against Complainant for filing this appeal; and Respondent is to rescind the August 15, 2003 memorandum.

- C. Leo Bellio v. Department of Revenue, Liquor & Tobacco Enforcement Division, State Personnel Board case number 2005B052(C) (December 23, 2005).

Complainant, a criminal investigator, appealed his suspension, demotion and the imposition of a corrective action by Respondent, and sought rescission of the corrective action, rescission of the disciplinary action, restoration to the rank of Criminal Investigator I in the Liquor & Tobacco Enforcement Division, an award of back pay for the three-day suspension and the difference in pay between the rank of Criminal Investigator I and Criminal Investigator Intern during the period of demotion, entry of a cease and desist order to prohibit the agency from enforcing any current work plans issued against him, and the initiation of disciplinary action against his supervisors for engaging in unlawful discrimination against him based upon his age. After hearing, the ALJ found that Complainant did not commit all of the acts for which he was disciplined and Respondent failed to fairly consider all of the evidence before it, including the fact that, as established by Complainant's performance evaluations and his nomination for a prestigious state government award, he was a valued employee who had worked for the state for over seventeen years without any prior communication or interpersonal problems with supervisors or a disciplinary history. Additionally, the ALJ determined that, given the gathered evidence, Respondent did not reach reasonable conclusions, thus rendering its decisions arbitrary, capricious, or contrary to rule or law and, further, that the discipline imposed was outside the range of reasonable alternatives. The ALJ ordered that the April 2004 Corrective Action is rescinded and the November 2004 Disciplinary Action is modified to a corrective action; Complainant is awarded full back pay and benefits for the period of his suspension and demotion; Respondent did not discriminate against Complainant based on age; and attorney fees and costs are not awarded.

## **VI. REVIEW OF THE MINUTES FROM THE DECEMBER 20, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

## **VII. ACKNOWLEDGMENTS**

**DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS DECEMBER 20, 2005 PUBLIC MEETING:**

- A. Vern Mirante v. Department of Natural Resources, Colorado State Parks, Steamboat Lake State Park, State Personnel Board case number 2005G074.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Renee Dolman v. Department of Human Services, Division of Vocational Rehabilitation, State Personnel Board case number 2006G028.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

## **VIII. REPORT OF THE STATE PERSONNEL DIRECTOR**

### **IX. ADMINISTRATIVE MATTERS & COMMENTS**

#### **A. ADMINISTRATIVE MATTERS**

- Budget Report and Revenue and Expense Report
- Cases on Appeal to the Board and to Appellate Courts
- Cases Scheduled for Preliminary Review
- Web Site Statistics: October 2005 - 34,969; November 2005 - 33,615
- Opinion affirming Board Order in Smoke v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board case number 2004G025, Court of Appeals No. 04CA1371

#### **B. OTHER BOARD BUSINESS**

- Staff Activities

#### **C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC**

### **X. PROPOSED LEGISLATION AND/OR RULEMAKING**

### **XI. EXECUTIVE SESSION**

- A. Case Status Report
- B. Minutes of the December 20, 2005 Executive Session
- C. Other Business

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**NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.**

<b>February 21, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>March 21, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>April 18, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>May 16, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>June 20, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>